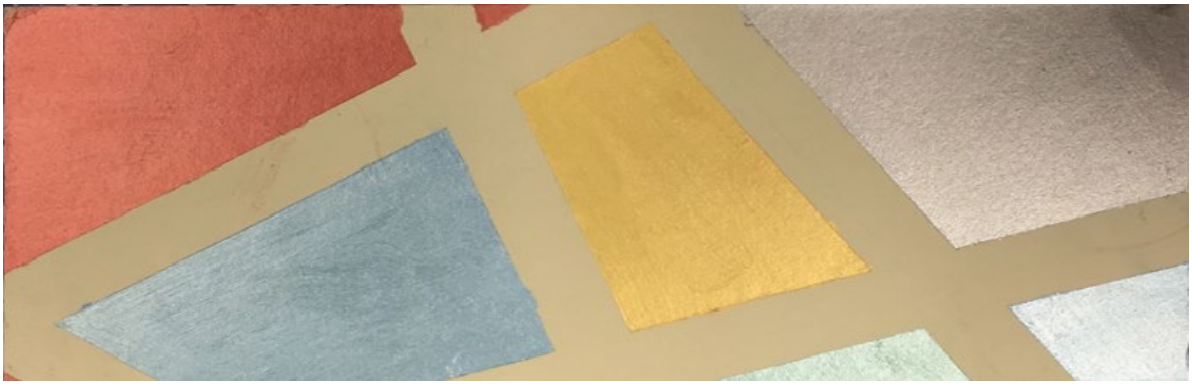

Welcome to the November 2025 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: *Cheshire West 2*, the return of LPS and where the buck stops with termination;

(2) In the Property and Affairs Report: accessing Child Trust Funds and LPA fee increase;

(3) In the Practice and Procedure Report: where (not if) brain stem death testing should take place;

(4) In the Mental Health Matters Report: progress of the Mental Health Bill and the duties owed by AMHPs;

(5) In the Children's Capacity Report: resources for children transitioning to adult in the palliative context.

(6) The Wider Context: the Terminally Ill Adults (End of Life) Bill before the House of Lords, and CQC despairs at the state of care.

(7) In the Scotland Report: an update on AWI reform.

You can find our past issues, our case summaries, and more on our dedicated sub-site here, where you can also sign up to the Mental Capacity Report.

Editors
Alex Ruck Keene KC (Hon)
Victoria Butler-Cole KC
Neil Allen
Nicola Kohn
Katie Scott
Arianna Kelly
Nyasha Weinberg

Scottish Contributors
Adrian Ward
Jill Stavert

The picture at the top, "*Colourful*," is by Geoffrey Files, a young autistic man. We are very grateful to him and his family for permission to use his artwork.

Contents

The Terminally Ill Adults (End of Life) Bill

A further Committee has been convened – this time by the House of Lords – to consider the Bill. The progress of the Committee (before whom Alex has given evidence) can be followed here. Progress more generally can be followed on Alex's resources page here.

Restrictive practice and PRN medication

Two useful guidance documents have recently been published. NHSE has published guidance on identifying restrictive practice. Although it is stated to be for the use of those in inpatient mental health services, it is equally applicable in other care settings. CQC has also published updated guidance on PRN ('as needed') medication for adult social care providers.

CQC State of Care report 2024/25

The CQC's 2024/25 'State of Care' report was published on 24 October 2025. We note some of the general findings regarding the 'state of care' in adult social care, mental health and healthcare for people with dementia and learning disabilities and autistic people.

- *In adult social care, the demand for support funded by a local authority continued to rise – new requests for care were 4% higher in 2023/24 than in the previous year, and 8% higher than in 2019/20. For adults of working age, there has been a large growth in demand for support, with requests per 100,000 people 14% higher than 4 years earlier. But, over the last 20 years, the proportion of older people who receive local authority-funded long-term social care has fallen from 8.2% to 3.6%....*

- *In 2024/25, people were still waiting too long for mental health care and were unable to access the care they need when they needed it. During the year, there was an average of 453,930 new referrals to secondary mental health services every month – an increase of 15% from 2022/23. Furthermore, a third of the respondents (33%) to our Community mental health survey reported waiting 3 months or more.*

- *Issues with recruitment, retention and understaffing in some areas are affecting people's care. Vacancy and turnover rates in adult social care have continued to fall but, at the same time, international recruitment has declined rapidly, and ending new work visas for care workers is a cause for concern. Vacancy levels for adult social care staff are currently 3 times higher than those of the wider job market. Rising financial pressures continue to be a risk for the sustainability of some adult social care services, including in the homecare sector. Despite an 11% growth in the sector during the last year, we are concerned that some homecare providers have said they are handing back local authority contracts due to rising*

costs. We are also concerned about the burden on unpaid carers.

- *Mental health services continue to face systemic recruitment and retention challenges as staff feel burnt out and overworked. Hospitals are also facing workforce challenges. We continue to hear how persistent understaffing and a poor mix of skills, along with pressure to admit patients to hospital despite a lack of capacity, affects the wellbeing of staff and therefore the care that people receive.*

- *There are significant challenges around funding and system working, as poor communication and collaboration between services, and problems with shared care protocols can have a negative impact on people's experience of care, the co-ordination of their care and transitions between care pathways….Navigating the care system remains challenging, especially for people with needs that are more complex to meet or who have limited advocacy – this includes people living with dementia, autistic people and people with a learning disability and people living in more deprived areas.*

- *Although more people in England are being diagnosed with dementia, staff in health and social care do not always understand the specific care needs of these people and providers do not always have the necessary knowledge of person-centred approaches and dementia-friendly environments.*

- *Autistic people and people with a learning disability can find it challenging to get an appointment with their GP, because booking systems may not offer the flexibility and choice that they need. Our research also suggests that there are not always the right reasonable adjustments to make primary care a positive experience.*

- *In 2024/25, we delivered a series of Independent Care (Education) and Treatment Reviews (IC(E)TRs) into the care and treatment of autistic people and people with a learning disability who are in long-term segregation. Reviews for some people noted there was no discharge plan in place, or even that they had not had discussions about being discharged or leaving long-term segregation.*

- *Longstanding inequalities in mental health care for Black men continue. Staff must be properly trained to fight racism and support Black men with respect and understanding, and services need to be held accountable when they fail to do the right thing.*

- *Our joint targeted area inspections with Ofsted, His Majesty's Inspectorate of Constabulary, Fire and Rescue Services, and His Majesty's Inspectorate of Probation looked at serious youth violence. They showed that children with special educational needs or disabilities are waiting too long to have their needs assessed, which makes them more vulnerable to the consequences of serious youth violence.*

- *Although local authorities have worked to increase and improve their homecare capacity through reviews and new approaches to commissioning, insufficient homecare capacity often affects the ability of hospitals to discharge people safely, which affects the flow of the system and leads to long delays for care and waiting lists, and then affects people's health and wellbeing.*

In relation to the Deprivation of Liberty Safeguards, the report painted a very bleak picture.

- *The number of applications to authorise the deprivation of a person's liberty have continued to increase significantly over the last decade – far beyond the levels expected*

when the safeguards were designed, which often results in lengthy delays.

- *Since April 2020, we have seen year-on-year increases in the number of notifications we receive. In 2024/25, we received over 185,000 notifications, a 15% increase on the previous year.*
- *Issues with the Deprivation of Liberty Safeguards (DoLS) system continue to disproportionately affect certain groups of people. Our survey of Mental Capacity Act leads in hospitals highlighted particular concerns around older people, including those with dementia.*
- *The wider policy landscape in health and social care is changing – the introduction of the Mental Health Bill in Parliament and the government's recent announcement that it intends to take forward the consultation on the Liberty Protection Safeguards are likely to have implications for the DoLS system.*
- *Another issue we have raised consistently in many State of Care reports is the variation in the way staff understand and apply the safeguards. This year, we continued to find examples of staff not properly understanding when DoLS is needed or failing to recognise and review restrictions appropriately.*
- *While some local authorities reported not having any DoLS backlogs, others were struggling to meet demand and a few hospital providers told us that local authorities were not completing timely assessments or providing adequate feedback on the application process. According to the Association of Directors of Adult Social Services (ADASS) Spring Survey, directors have the least confidence that their adult social care budgets will be sufficient to meet their legal duties in relation to DoLS in 2025/26, compared with other legal duties. Local authorities with no waiting lists for DoLS applications or renewals told us about investing resources to cover the increase in applications in recent years and ensure levels of Best Interest Assessors were sufficient… For example, staff at one local authority outlined that lower risk assessments could take 2 to 3 years to complete. This poses a significant risk of people being unlawfully deprived of their liberty while they wait years for an authorisation. It may also increase inequalities for people who are more likely to be deemed lower risk, such as people with a learning disability or those living with dementia, as we highlighted in our 2023/24 report.*

Book Review

János Fiala-Butoria, *Implementing the Right to Decide under the Convention on the Rights of Persons with Disabilities: Supporting the Legal Capacity of All Persons with Disabilities* (Bloomsbury, 2025, 167 pp, hardback / ebook, £81.00 / £64.80)

I should start this review with a confession. I asked to be provided with this book for review out of a slight sense of duty, so as to keep myself abreast of the literature in this area. The title made me think that I might be going to be reading (yet) another argument in favour of supported decision-making based upon (in essence) the assertion that this is what the Committee on the Rights of Persons with Disabilities has said is necessary. I was, I have to confess, mentally preparing myself for the sound of distinctly ill horses being flogged.

I was completely wrong.

This is quite the most interesting and useful book that I can remember reading in relation to this issue for a very long time.

To start with the base level reason it is interesting; it serves as a state of the art review of the (extensive) debates about the meaning of the right to legal capacity in Article 12 of the CRPD. The body of the text summarises positions fairly and accurately, and the footnotes provide a ready-made reading list.

But the book is much more than that, and that it is I think has a considerable amount to do with the author's background. He is a practising lawyer, having been the first legal officer at the Mental Disability Advocacy Centre (now Validity), an NGO which has, through directly supporting, and intervening in, cases before the European Court of Human Rights, done more than any other body to shift the dial in the thinking of the Strasbourg court. He is also an academic, having studied at Harvard, and now Lecturer at the Centre for Disability Law and Policy, University of Galway, Ireland, carrying out his legal work now on a part-time basis through this firm he has established with his wife.

The book combines the twin streams of practice and academia to powerful effect, ensuring that the book remains clear-eyed about what both law and theory can, and cannot, do.

After a chapter discussing the concept of legal capacity, the book moves to a clear exposition of how neither those advocating for the 'absolutist' or the 'constricted' position regarding legal capacity are able to find definitive support for their position in the language of Article 12 CRPD itself. The book then turns to delineating the inherent features of guardianship and its alternative – supported decision-making – but, importantly, and unusually, without seeking to denigrate the good faith of those wedded to either approach.[1] By taking both at their ideal, and then their 'actual' (although, in the case of supported decision-making, recognising the extent to which it is often theoretical, so 'actual' is perhaps more difficult to analyse), Fiala-Butoria allows the reader to think for themselves as to whether, on balance, the harms from guardianship outweigh the potential harms from supported decision-making. He also, importantly, allows readers to see for themselves how the nature and scale of those harms may vary in subtle ways depending on the perspective adopted.

In the last chapter, Fiala-Butoria lays out his proposed model for addressing the case of persons with high support needs, addressing the shortcomings in both the 'support only' framework advocated by abolitionists, and the 'some guardianship' framework advocated by those who take a 'constricted' position. His model of a modified support framework is upfront as to the fact that some decisions made by supporters will be substitute decisions, the 'cut-off' being as to whether the person is able to make their wishes known to an

[1] I should, perhaps, declare an interest in that the book engages on several occasions in a thoughtful and nuanced fashion with this article I co-wrote in 2023 which lies in the 'constricted' camp.

outside person.[2] He is also upfront that it is not a perfect solution – and his modesty in this regard is refreshing in a field too often dominated by confident assertion – but lays out with clarity his case for it being no worse than, and in significant ways better than either of the alternatives.

Readers familiar with the Mental Capacity Act 2005 might instinctively react to the analysis of guardianship to the effect that 'this has nothing to do with us, because our model is not based on guardianship.' This is not entirely true, especially in the sphere of property and affairs, but it would be interesting to think further about (and I hope to be able to do in a conversation with Fiala-Butoria in due course from the shed) how the 'relative harms' arguments apply to a model such as the MCA 2005 which is much less reliant on guardianship in the health and welfare field. But I would absolutely emphasise that this is a book which challenges, or should challenge, those familiar with the MCA 2005 just as much as those who operate 'old-style' guardianship frameworks.

Overall, therefore, this is an excellent book, explaining why I immediately asked King's College Library to order copies for the Masters' students on my Mental Health and Capacity Law course, as well as recommending it to all the policy makers, law reformers and academics that I have seen in the weeks since reading it.

Alex Ruck Keene

[Full disclosure: I am grateful to the publishers for providing me with a copy of this book. I am always happy to review works in or related to the field of mental capacity (broadly defined)]

[2] Through a very strange coincidence of timing, this model is, in some ways, precisely the model that is being considered by the Supreme Court in the context of the Attorney General for Northern Ireland's reference, as it is being asked to consider whether the test for consenting to confinement is that set out in the relevant domestic capacity legislation, or whether it can be answered in a broader fashion focusing on the reliability of the person's wishes and feelings. I will not comment further on that here, given my involvement in the case.

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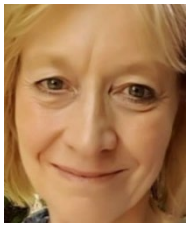

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Conferences

Members of the Court of Protection team regularly present at seminars and webinars arranged both by Chambers and by others.

Alex also does a regular series of 'shedinars,' including capacity fundamentals and 'in conversation with' those who can bring light to bear upon capacity in practice. They can be found on his website.

Advertising conferences and training events

If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to the dementia charity My Life Films in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Our next edition will be out in December. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Report in the future please contact: marketing@39essex.com.

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